that courts will not anticipate the omission of a legal duty. *State ex rel. Piper* v. *Gracey*, 11 Nev. 223. Many of these cases could be supported either on the ground that, like the remedy of specific performance, *mandamus* is granted only in the sound discretion of the court, or on the ground that no legal duty rested on the defendant. *United States ex rel. Langley* v. *Bowen*, 6 D. C. 196; *Northwestern Warehouse Co.* v. *Oregon Ry. & Navigation Co.*, 32 Wash. 218, 73 Pac. 388. The prevailing view seems inconsistent with the very nature of *mandamus*, which is to prevent a failure of justice. *Attorney General* v. *City of Boston*, 123 Mass. 460. As the court points out, often the benefits of the act will be lessened or lost, and irremediable damage done, unless it is performed within the stated time. *State ex rel. Howells* v. *Metcalf*, 18 S. D. 393, 100 N. W. 923. An opposite result would secure to the public punctual performance, and if the writ were not made peremptory, the defendant could not be unduly prejudiced by being forced to show justification for a refusal to perform. See *Chicago, etc. R. Co.* v. *Commissioners of Chase County*, 49 Kan. 399, 414, 30 Pac. 456, 459. The decision, although overruling previous Kansas cases, and contrary to the great weight of authority, shows a commendable tendency towards preventive justice.

MECHANICS' LIENS — EFFECT OF REPLACING DEFECTIVE MATERIALS ON TIME FOR FILING STATEMENT. — A statute made the lien of a subcontractor for materials furnished conditional on the filing of a statement within sixty days after furnishing the materials. A subcontractor replaced certain defective materials at the instance of the owner of the building and filed a statement within sixty days afterwards. The other materials furnished by the subcontractor were all delivered more than sixty days before the filing of the statement. *Held*, that the subcontractor has no lien for the materials furnished. *Cady Lumber Co.* v. *Reed*, 133 N. W. 424 (Neb.).

Under such statutes the period for filing the statement begins to run after the last item has been furnished under the contract. *Patton* v. *Matter*, 21 Ind. App. 277, 52 N. E. 173; *Hensel* v. *Johnson*, 94 Md. 729, 51 Atl. 575. The authorities on the question decided in the principal case are in conflict. The cases supporting the principal case are based on the ground that the materials are not furnished under the contract, but are given as a reparation for an injury inflicted. *Harrison* v. *Homœopathic Association*, 134 Pa. St. 558, 19 Atl. 804; *Voightman* v. *Southern Ry. Co.*, 123 Tenn. 452, 131 S. W. 982. The cases opposed argue that the materials are furnished under the contract, that in furnishing them the subcontractor fulfils a hitherto imperfectly performed obligation. *St. Louis National Stock Yards* v. *O'Reilly*, 85 Ill. 546; *Conlee* v. *Clark*, 14 Ind. App. 205, 42 N. E. 762. The analysis of the latter cases would seem correct. It might be urged in objection to this view that it would subject the owner to the danger of a double payment where he had paid the original contractor sixty days after the delivery but before the discovery of the defects. But in such a case, it is submitted, the subcontractor would be estopped for this purpose to set up that the subsequently furnished materials were furnished under the contract.

MECHANICS' LIENS — MATERIALS FURNISHED BUT NOT USED. — The plaintiffs supplied iron and steel work for the construction of the defendants' building. Owing to a change in the plans over which the plaintiffs had no control, a part of the materials furnished by them was never used. A statute provided that "whoever . . . furnishes labor or materials in erecting . . . a house, building, or appurtenances . . . has a lien thereon." *Held*, that the plaintiffs are not entitled to a lien for the unused materials. *Fletcher-Crowell Co.* v. *Chevalier*, 81 Atl. 578 (Me.).

Jurisdictions are squarely in conflict on whether materials furnished but

not actually used can be the basis of a mechanic's lien under the statutes. See BOISOT, MECHANICS' LIENS, § 119; note to *Central Lumber Co.* v. *Braddock Land and Granite Co.*, 13 Ann. Cas. 11. The justice of mechanics' lien laws consists in charging the realty whose value has been enhanced by the addition of labor or materials as security for the price thereof. See *Taggard* v. *Buckmore*, 42 Me. 77, 81; BOISOT, MECHANICS' LIENS, § 7. Therefore, even a liberal construction of the statute should not include materials which are never used. Actual use should be required, though not necessarily physical incorporation into the structure. See 25 HARV. L. REV. 92.

MORTGAGES — PRIORITIES — EFFECT OF LIS PENDENS ON MORTGAGE FOR FUTURE ADVANCES. — The plaintiff gave A. notes to collect and invest the proceeds in land in the plaintiff's name. A. took title in his own name and executed a mortgage to secure future advances to the defendants, who had no knowledge of the plaintiff's right. The plaintiff sued A. for an accounting and asserted a lien on the land, and during the suit money was advanced by the defendants, still without knowledge either of the plaintiff's right or of the suit. *Held*, that the defendants' mortgage for all the sums advanced is entitled to priority over the plaintiff's lien. *Straeffer* v. *Rodman*, 141 S. W. 742 (Ky.).

Where a person has acquired a right in specific property, the doctrine of *lis pendens* will not invalidate any act he may do after bringing of suit in pursuance of such right or for the purpose of carrying it into effect. Thus, where an agreement to sell is made before suit, a conveyance afterward is not invalidated. *Parks* v. *Smoot's Admrs.*, 105 Ky. 63, 48 S. W. 146. So also a mortgagee may buy at his own sale pending a suit to establish a mechanic's lien. *Andrews* v. *National Foundry & Pipe Works*, 77 Fed. 774. By the weight of authority a mortgage for future advances vests a right in the mortgagee for all advances which may be made, if they are optional, unless there is actual notice of intervening encumbrances. *Ward* v. *Cooke*, 17 N. J. Eq. 93. And, if the advances are obligatory, actual notice will not invalidate them. *Crane* v. *Deming*, 7 Conn. 387. The principal case is therefore sound. As the doctrine of *lis pendens* does not apply, the mortgagees are *bonâ fide* purchasers without notice of the plaintiff's right.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — DAMAGE CAUSED BY BURSTING OF SEWER OF INADEQUATE SIZE. — A city constructed a sewer, the capacity of which was insufficient to provide for the sewage and surface water reasonably to be expected. A rainstorm caused the sewer to burst, whereby goods in the cellar of the plaintiff's warehouse were damaged. *Held*, that if the rainstorm was extraordinary, the city is not liable. *Geuder, Paeschke & Frey Co.* v. *City of Milwaukee*, 133 N. W. 835 (Wis.).

A city is not answerable for damage caused by insufficiency of the plan of sewerage to drain the plaintiff's premises. *Mills* v. *City of Brooklyn*, 32 N. Y. 489; *Robinson* v. *City of Everett*, 191 Mass. 587, 77 N. E. 1151. It follows that the language of the principal case is too broad in intimating that a city must use due care to provide means to carry away surface water ordinarily to be expected. A city is liable, however, when the execution of the plan of sewerage results in a "taking" of private property. Collecting water in an artificial channel with an inadequate outlet, which, it can be foreseen, will flood the plaintiff's lands, is a "taking" of his property. *Ashley* v. *Port Huron*, 35 Mich. 296; *Seifert* v. *City of Brooklyn*, 101 N. Y. 136, 4 N. E. 321. See 1 LEWIS, EMINENT DOMAIN, 3 ed., § 65. The outlet must be large enough to provide for all water reasonably to be expected, and hence the city should be liable whether the storm is ordinary or extraordinary, if it is not unprecedented. *Cf. Philadelphia, etc. R. Co.* v. *Davis*, 68 Md. 281, 11 Atl. 822; *Gulf*,